



IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-906

OTTER TAIL POWER COMPANY,

Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION and ALEXANDRIA,
BARNESVILLE, BENSON, DETROIT LAKES, HENNING, LAKE PARK,
ORTONVILLE and WARREN, MINNESOTA, and BIG STONE CITY,
SOUTH DAKOTA,

Respondents.

**SEPARATE APPENDIX
CONTAINING APPENDICES D AND E**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT**

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Certificate of Service

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith, and James G. Watt.

Otter Tail Power Company
Docket Nos. ER77-5, ER77-6,
ER77-7 and E-9544

ORDER ACCEPTING FOR FILING AND SUSPENDING
CERTAIN PROPOSED RATE SCHEDULE FILINGS,
ESTABLISHING PROCEDURES, CONSOLIDATING
PROCEEDINGS AND GRANTING INTERVENTIONS
(Issued December 28, 1976)

On October 4, 1976, Otter Tail Power Company (Otter Tail) tendered for filing an initial rate schedule providing, primarily, for transmission service by Otter Tail to municipal customers to replace transmission service provided to the United States Bureau of Reclamation (Bureau) for the benefit of the municipalities (Docket No. ER77-5). Otter Tail was advised by letter dated October 28, 1976, that its submittal was deficient. The filing was completed with the submittal of the required information on November 15, 1976, the official filing date. Additionally, on October 4, 1976, Otter Tail filed a Notice of Termination of Rate Schedule No. 84, an interconnection agreement between Otter Tail and the Bureau which provides for, among other services, the aforementioned transmission of preference power to municipal customers (Docket No. ER77-6); and Notice of Termination of Special Municipal Electric Service Agreements with the municipal customers (Docket No. ER77-7).

Otter Tail's proposed rates will result in additional charges to municipal customers of \$944,731 (286%) for the twelve month period ending December 31, 1977 (individual increases range from 183% to 332%). The proposed rates provide for a firm transmission charge of \$21.05/kw/year (approximately 4.2 mill/kwh). Otter Tail will supply power and energy in excess of the amount allotted to it through its arrangements with the Bureau, at a rate of \$60.56/kw/year and \$1.0836¢/kwh. Otter Tail requests that the instant agreement become effective January 1, 1977.

The Notice of Termination which Otter Tail has submitted for its FPC Rate Schedule No. 84 (ER77-6) would terminate an agreement that provides a myriad of services between the parties in addition to the transmission of preference power for the Bureau. The agreement provides for sales of secondary and dump energy to Otter Tail, interchange of emergency supplies, and standby services, and wheeling for the account of each other. The parties are interconnected at no less than seventeen points in three states pursuant to the agreement. Their 115 kv and 230 kv lines form an essential part of an extensive regional transmission system. The termination of Rate Schedule No. 84 will impact significantly on the electric systems in this area.

On October 4, 1976, Otter Tail submitted for filing Notices of Termination of Special Municipal Electric Service Agreements (Special Agreements) between 17 municipal customers and itself. The Special Agreements provide for firming transmission service, supplemental power and energy, reserve capacity service, economy and maintenance energy, and emergency service. Three of these agreements do not expire pursuant to their own terms until later this decade (See Attachment).

Docket No. E-9544

On November 28, 1975, the Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Tyler, and Warren, Minnesota (Cities) filed a complaint against Otter Tail pursuant to Section 205(c) of the Federal Power Act and Section 1.6 of the Commission's Rules of Practice and Procedure, alleging that Otter Tail had failed to comply with §35.15 of the Commission's

Regulations (Docket No. E-9544). The Cities' Special Agreements ostensibly terminated by their own terms as follows:

City	FPC Rate Schedule No.	Expiration Date of Agreement
Alexandria, Minnesota	125	10/28/73
Barnesville, Minnesota	135	11/30/75
Benson, Minnesota	133	11/30/75
Detroit Lakes, Minnesota	139	11/30/75
Henning, Minnesota	134	11/30/75
Tyler, Minnesota	116	3/22/72
Warren, Minnesota	140	11/30/75

The Cities state that Alexandria and Tyler requested Otter Tail to continue to furnish service under the Special Agreements beyond the expiration date of their contracts. They assert that Alexandria and Tyler terminated the service by letters dated February 12, 1975 and February 18, 1975,¹ and ceased receiving and paying for services after the date of their respective termination letters. Additionally, the Cities maintain that Barnesville, Benson, Detroit Lakes, Henning, and Warren have confirmed the expiration of their Special Agreements with Otter Tail and notified it that they no longer desired to receive firming transmission service after the expiration of the Special Agreements.² The Cities allege that Alexandria and Tyler did not receive a response from Otter Tail to their letters of termination and that Barnesville, Benson, Detroit Lakes, Henning and Warren received responses from Otter Tail indicating that Otter Tail intended to continue to provide services under the Special Agreements after the expiration of the Agreements and the Cities' refusal to accept such services.

¹ Cities complaint, Exhibits A and B respectively.

² Complaint, Exhibits C, D, E, F, G.

D-4 [R. 492]

Section 35.15 of the Commission's Regulations, *Notices of Cancellation or Termination*, provides that when a rate schedule required to be filed with the Commission is proposed to be cancelled or is to terminate by its own terms and no new schedule is to be filed in its place, the party required to file the schedule shall notify the Commission of the cancellation or termination. The Cities, in their complaint, request that the Commission confirm termination of Alexandria's and Tyler's Special Agreements in accordance with their proffered notices and compel Otter Tail to file appropriate Notices of Termination for Barnesville, Benson, Detroit Lakes, Henning, and Warren, Minnesota, or, in the alternative, confirm such terminations in accordance with the terms of the Special Agreements.

Public Notice

Docket No. ER77-5—Notice was issued October 14, 1976, with petitions to intervene or protests due on November 19, 1976. On that date nine of the affected municipalities³ jointly filed a petition to intervene contending that:

- (1) The submittal must be treated as a rate change under Section 35.13 of the Regulations;
- (2) The supplemental service rate is discriminatory in that it contains different rates than the Elbow Lake agreements;
- (3) The cost-of-service data is not responsive to the Regulations; and
- (4) The filed transmission rate is higher than Otter Tail's own cost-of-service determination.

³ The Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Lake Park, Ortonville, and Warren, Minnesota, and Big Stone City, South Dakota.

D-5 [R. 493]

They maintain that the filing will have a significant impact on the individual Cities and request that the filing be rejected because of its deficiencies, or, in the alternative, be suspended for five months.

On November 16, 1976, the City of Breckenridge, Minnesota requested that the Commission reject Otter Tail's filing. The City contends that:

- (1) The depreciation for plant and equipment appears unjustifiably high;
- (2) The allocation of cost on a peak demand basis is not reasonable; and
- (3) Its costs will double.

On November 22, 1976, the Department of the Interior (Interior), on behalf of the Bureau, filed an untimely petition to intervene. Interior states that during renegotiation of the present Bureau-Otter Tail Agreement, Otter Tail stated that it would wheel power to the municipalities under independent Agreements but would not wheel Bureau power to the municipalities under a Bureau-Otter Tail Agreement. Interior's grounds for intervention are: (1) its concern over the rates Otter Tail will charge to wheel Bureau power and (2) a desire to offer its customers the benefit of its engineering expertise.

Docket No. ER77-6

Notice of Termination of the Bureau-Otter Tail Agreement was issued on November 10, 1976, with protests or petitions to intervene due on or before November 24, 1976. On November 26, 1976, a joint petition to intervene was filed by the Cities of Alexandria (Minnesota), *et al.*⁴ The Cities contend that the proposed termination of the Bureau-Otter Tail Agreement may lead to transmission rates which may be unjust,

⁴ These are the same Cities that filed a joint petition to intervene in Docket No. ER77-5.

D-6 [R. 494]

unreasonable, and unduly discriminatory. The Cities request that the proposed termination be suspended until the issues in Docket No. ER77-5 are adjudicated.

Docket No. ER77-7

Notice of termination of the Special Agreements was issued on November 10, 1976, with protests or petitions to intervene due on or before November 24, 1976. On November 26, 1976, the Cities of Alexandria, Minnesota, *et al.*,⁵ filed a joint petition to intervene. The Cities maintain that allowing the Special Agreements to terminate on December 31, 1976, would lend credence to Otter Tail's position that they are tied to the Bureau-Otter Tail Agreement. They contend that under the Special Agreements between Otter Tail and the Cities of Lake Park and Ortonville, Minnesota, Otter Tail supplies transformers that step down the power and energy from 41.6 kv to 4.16 kv; and that acceptance of the termination for these Cities will leave them without electric service. The proposed rate schedule in Docket No. ER77-5 contains no provision for transformation, and the Cities do not own such equipment.

Review of Otter Tail's proposed transmission rate schedule submitted for filing as an initial rate schedule in Docket No. ER77-5 indicates that it should be treated as a change in rates which is properly filed under Section 35.13 of the Regulations. Although Otter Tail is currently transmitting power for Bureau pursuant to the terms of Rate Schedule No. 84, the beneficiaries of the transmission are the municipal customers. The Bureau pays Otter Tail 1.0 mill/kwh and the Bureau recovers that cost in its power rates from the municipal customers. Otter Tail's filing will in effect increase the rates that the municipalities will have to pay for the transmission of Bureau power.

Otter Tail's proposed rates rendered for filing in Docket No. ER77-5 have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory,

⁵ These are the same Cities that filed a joint petition to intervene in Docket No. ER77-5.

D-7 [R. 495]

preferential or otherwise unlawful. The Commission therefore accepts Otter Tail's proposed transmission rates for filing as a change of rates and suspends them from operation for five months and establishes hearing procedures.

Due to the significant impact the termination of the Bureau-Otter Tail Agreement will have on the electric systems in the region, the Commission shall accept the Notice of Termination of the Agreement and suspend it from operation for five months. In addition, the Commission shall order an expedited hearing in Docket No. ER77-6 to determine whether termination of the Agreement is in the public interest.

The Notices of Termination of the Special Agreements of the Cities of Badger, Big Stone City, and Estelline, South Dakota, and the Cities of Breckenridge, Lake Park, New Folden, Neilsville, Ortonville, Shelly, and Stephen, Minnesota are accepted for filing and suspended for five months.

The City of Alexandria's Special Agreement expired pursuant to its terms on October 28, 1973. Alexandria requested that Otter Tail continue to provide service beyond the expiration date of its contract. By letter dated February 12, 1975, Alexandria notified Otter Tail that it would no longer require the services provided under the Special Agreement after March 20, 1975. It maintains that it ceased paying for and receiving service after the date of its termination letter. The Commission, therefore, will treat March 20, 1975, as the effective termination date of Alexandria's Special Agreement.

The City of Tyler's Special Agreement expired pursuant to its terms on March 22, 1972. Tyler, as did Alexandria, requested that Otter Tail continue to provide service after the expiration of the Agreement. By letter dated February 18, 1976, Tyler notified Otter Tail that it no longer required the services rendered under the Agreement. Tyler maintains that it ceased paying for and receiving services under the Agreement after its termination letter. The Commission, therefore, will treat February 18, 1975, as the effective termination date of Tyler's Special Agreement.

D-8 [R. 496]

The Cities of Barnesville, Benson, Detroit Lakes, Henning, and Warren notified Otter Tail by letters that, after the expiration dates of their respective Special Agreements with Otter Tail, November 30, 1975, they would no longer require the services provided thereunder. The Commission will treat November 30, 1975, as the effective termination date of the Cities of Barnesville, Benson, Detroit Lakes, Henning, and Warren's Special Agreements.

The Commission orders that the Notice of Termination of the Special Agreements in Docket No. ER77-7 be consolidated for purposes of a hearing and a decision with Docket No. ER77-6. An expedited investigation will be instituted to determine the impact such terminations will have on the continuation of service in the area.

The issues in Docket Nos. ER77-5 and E-9544 deal with common questions of law and fact. We will therefore consolidate these two proceedings for the purposes of hearing and decision.

The Commission finds:

(1) Good cause exists to accept for filing Otter Tail's proposed transmission rates tendered on October 4, 1976, and to suspend those rates for five months, beyond the requested effective date of January 1, 1977, until June 1, 1977, when they will be permitted to become effective, subject to refund, pending the outcome of a hearing and decision thereon.

(2) The participation of the Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Lake Park, Ortonville, and Warren, Minnesota, and Big Stone City, South Dakota, and the Department of the Interior, in Docket No. ER77-5, may be in the public interest.

(3) It is in the public interest to consolidate Docket Nos. ER77-6 and ER77-7 and to institute an investigation to determine the impact such terminations will have on the continuation of service in the area.

D-9 [R. 497]

(4) The participation of the Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Lake Park, Ortonville, and Warren, Minnesota, and Big Stone City, South Dakota, in Docket Nos. ER77-6 and ER77-7 may be in the public interest.

(5) Good cause exists to consolidate the proceedings in Docket Nos. E-9544 and ER77-5 for the purposes of hearing and decision.

The Commission orders:

(A) Pending a hearing and decision thereon, Otter Tail's proposed transmission rates in Docket No. ER77-5 are hereby accepted for filing and suspended for five months, until June 1, 1977, when they will be permitted to become effective subject to refund.

(B) Pursuant to the authority of the Federal Power Act, particularly Sections 205 and 206 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a hearing shall be held concerning the justness and reasonableness of Otter Tail's proposed transmission rates.

(C) Commission Staff shall prepare and serve top sheets on all parties on or before May 1, 1977 (See Administrative Order No. 157).

(D) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose (See Delegation of Authority, 18 CFR 3.5(d)), shall convene a settlement conference in this proceeding on a date certain within 10 days after the service of top sheets by the Staff, in a hearing or conference room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. Said Presiding Administrative Law Judge is hereby authorized to establish all procedural dates and to rule upon all motions (with the exceptions of petitions to intervene, motions to consolidate and sever, and motions to dismiss), as provided for in the Rules of Practice and Procedure.

D-10 [R. 498]

(E) Otter Tail shall file monthly with the Commission the report on billing determinants and revenues collected under the presently effective rates and the proposed increased rates filed herein, as required by Section 35.19(a) of the Commission's Regulations, 18 CFR Section 35.19(a).

(F) The Notice of Termination of the Bureau-Otter Tail Agreement and the Notices of Termination of the Special Agreements for the Cities of Badger, Big Stone City, and Estelline, South Dakota, and Breckenridge, Lake Park, New Folden, Nielsville, Ortonville, Shelly, and Stephen, Minnesota, are hereby suspended for five months.

(G) Docket Nos. ER77-6 and ER77-7 are hereby consolidated for purposes of a hearing and decision.

(H) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose, shall conduct an expedited hearing in consolidated Docket Nos. ER77-6 and ER77-7 to determine if the proposed terminations are in the public interest. The Presiding Judge shall prescribe necessary procedures not provided for in this order, and shall otherwise conduct the hearing in accordance with the Commission's Rules and Regulations.

(I) The Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Lake Park, Ortonville, and Warren, Minnesota, and Big Stone City, South Dakota, are hereby permitted to intervene in Docket Nos. ER77-5, ER77-6, and ER77-7. The Department of Interior is hereby permitted to intervene in Docket No. ER77-5. The above interventions are subject to the Commission's Rules and Regulations. Participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions to intervene. The admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order of the Commission entered in these proceedings.

D-11 [R. 499]

(J) The effective termination date of Alexandria, Minnesota's Special Agreement is March 20, 1975. The effective termination date of Tyler, Minnesota's Special Agreement is February 18, 1975. The effective termination date of the Cities of Barnesville, Benson, Detroit Lakes, Henning, and Warren, Minnesota's Special Agreements is November 30, 1975.

(K) The proceedings in Docket Nos. E-9544 and ER77-5 are hereby consolidated for purposes of hearing and decision.

(L) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary

Special Municipal

Electric Service Agreement Provisions

Municipal (1)	Term (2)	Expiration Date (3)	Generation Capability*	
			(4)	
1. Alexandria, MN	10 years	10-20-72	Yes	14,145 kW
2. Badger, S.D.	10 years	1-1-76	No	
3. Barnesville, MN	10 years	12-1-75	Yes	1,400 kW
4. Benson, MN	10 years	12-1-75	Yes	3,600 kW
5. Big Stone City, S.D.	10 years	1-1-76	No	
6. Breckenridge, MN	10 years	12-20-79	No	
7. Detroit Lakes, MN	10 years	12-1-75	Yes	6,000 kW
8. Estelline, S.D.	10 years	1-1-76	Yes	375 kW
9. Henning, MN	10 years	12-1-75	No	
10. Lake Park, MN	10 years	12-1-75	No	
11. Newfolden, MN	10 years	12-20-79	No	
12. Nielsville, MN	10 years	12-1-75	No	
13. Ortonville, MN	10 years	12-1-75	No	
14. Shelly, MN	10 years	12-21-80	No	
15. Stephen, MN	10 years	12-1-75	No	
16. Tyler, MN	Service Discontinued 6/23/76		Yes	800 kW
17. Warren, MN	10 years	12-1-75	Yes	2,160 kW
				28,480 kW

*Source: Individual towns Form 12 reports for 1975

D-12 [R. 500]

E-1 [R. 618]

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don
S. Smith, John H. Holloman III, and
James G. Watt.

Otter Tail Power Company
Docket Nos. ER77-5, ER77-6, ER77-7,
E-9544 and E-8152

ORDER DENYING IN PART AND GRANTING
IN PART REHEARING
(Issued June 2, 1977)

On October 4, 1976, Otter Tail Power Company (Otter Tail) tendered for filing an initial rate schedule providing for transmission service by Otter Tail to municipal customers to replace transmission service provided to the United States Bureau of Reclamation (Bureau) for the benefit of the municipalities. Additionally, on October 4, 1976, Otter Tail filed a notice of termination of Rate Schedule No. 84, an interconnection agreement between Otter Tail and the Bureau, which provided for the aforementioned transmission of power to municipal customers (Docket No. ER77-6), and notices of termination of Special Municipal Electric Service Agreements (Special Agreements) with the municipal customers (Docket No. ER77-7).

By order issued December 28, 1976, in these Dockets (Order) the Commission:

(1) Suspended Otter Tail's proposed transmission rates in Docket No. ER77-5 for five months, until June 1, 1977, when they will become effective subject to refund;

(2) Suspended the notice of termination of the Bureau-Otter Tail Contract and the notices of termination of the Spe-

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cial Agreements for the Cities of Badger, Big Stone City and Estelline, South Dakota; and Breckenridge, Lake Park, Newfolden, Nielsville, Ortonville, Shelly, and Stephen, Minnesota for five months;

(3) Consolidated Docket Nos. ER77-6 and ER77-7 for purposes of a hearing and decision to determine if the proposed terminations are consistent with the public interest;

(4) Consolidated Docket Nos. ER77-5 and E-9544 for purposes of a hearing and decision;

[R. 619]

(5) Established March 20, 1975, as the effective date of the termination of Alexandria's Special Agreement, February 18, 1975, as the termination date of Tyler's Special Agreement, and November 30, 1975, as the termination date of Barnesville, Benson, Detroit Lakes, Henning and Warren, Minnesota's Special Agreements; and

(6) Granted the petitions to intervene of the Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Lake Park, Ortonville, and Warren, Minnesota, and Big Stone City, South Dakota, in Docket Nos. ER77-5, ER77-6, and ER77-7, and the Department of the Interior in Docket No. ER77-5.

On January 26, 1977, Otter Tail Power Company (Otter Tail) petitioned the Commission for rehearing of its Order. Otter Tail maintains that the Commission erred in issuing the Order in the following respects:

1. The Otter Tail filing in Docket No. ER77-5 should have been accepted for filing as an initial rate under Section 205 of the Federal Power Act (Act) and Section 35.12 of the Commission's Regulations because the filing was for a new type of service, and should not have been subject to refund.

2. Otter Tail's new wheeling rate should have been made effective January 1, 1977, and should not have been suspended for five months.

3. The Notice of Termination of the Bureau-Otter Tail Contract in Docket No. ER77-6 should not have been suspend-

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ed for five months but should have become effective December 31, 1976, as filed.

4. The Notices of Termination of the Special Agreements with the Cities of Badger, Big Stone City, and Estelline, South Dakota, and Breckenridge, Lake Park, Newfolden, Nielsville, Ortonville, Shelly and Stephen, Minnesota, in Docket No. ER77-7 should not have been suspended but should have become effective December 31, 1976, as filed.

5. The effective termination date of Alexandria, Minnesota's Special Agreement should not have been found to be March 20, 1975, but should be December 31, 1976.

6. The effective termination date of Tyler, Minnesota's Special Agreement should have been found to be December 31, 1976 instead of February 18, 1975.

[R. 620]

7. The effective termination date of Barnesville, Benson, Detroit Lakes, Henning, and Warren, Minnesota's Special Agreements should not have been found to be November 30, 1975, but December 31, 1976, as indicated by Otter Tail's Notice of Termination in Docket No. ER77-7.

8. Docket No. E-9544 should not have been consolidated with Docket No. ER77-5. It should have been terminated in accordance with the notices of termination filed in Docket No. ER77-7.

9. Docket No. E-8152 should have been consolidated with Docket No. ER77-5.

10. The Order does not accord with due process and is arbitrary, capricious, and unreasonable.

On February 22, 1977, Otter Tail filed a Document entitled Supplement To Petition For Rehearing in these dockets with the Commission.

Otter Tail's supplement to its petition for rehearing was not filed in a timely fashion, and therefore, we will not consider it in these proceedings. Section 1.34(a) does not provide for any supplementation of an application for rehearing beyond the 30-day filing period.

On February 25, 1977, the Commission issued an Order Granting Rehearing For Further Consideration in these Dockets. Our purpose for granting rehearing was to provide more time to consider the issues raised in Otter Tail's application for rehearing.

Otter Tail, on March 11, 1977, filed with the Commission a response to the Commission's order granting rehearing. Otter Tail in this filing requested that the Commission incorporate by reference its February 22, 1977 Supplement To Petition For Rehearing and its March 4, 1977 Objection of Otter Tail Power Company To Cities' Motion and consider them as a response to the Commission's February 25, 1977 rehearing order.

Section 1.34(d) of Rules of Practice and Procedure provides that parties may file responses in the nature of answers within 15 days after the issuance of an order granting rehearing. However, such response is limited to the issues upon which rehearing has been granted. Since the order granting rehearing was issued for the limited purpose of further consideration, substantive answers should not be entertained. Consequently, Otter Tail's response to the Commission's order granting rehearing, requesting that its February 22, 1977 Supplement and its March 4, 1977 Objection be incorporated by reference into the response, should be rejected.

[R. 621]

THE COMMISSION PROPERLY TREATED OTTER TAIL'S FILING IN ER77-5 AS A CHANGE IN RATE SCHEDULES

Otter Tail maintains that the essential error of the Order is that it does not recognize that its proposed rate schedule is for firm transmission service provided to municipalities in its service area for the transmission of power from any source and, as a consequence, should be treated as a new type of service (Petition for Rehearing 3). Otter Tail contends that its proposed rate schedule is not a rate increase because the nature of service is fundamentally different from the prior ser-

vice. It then notes several differences between the services rendered under the Bureau-Otter Tail Contract and its proposed rate schedule:

1. The new rate schedule is for *firm* capacity transmission service rather than for *excess* capacity transmission service under the Bureau-Otter Tail Contract.
2. The new rate is for the transmission of power from any power supplier, while the Bureau-Otter Tail Contract was for the transmission of Bureau power only.
3. The new rate is for transmission service for the municipalities, while the Bureau-Otter Tail Contract provided the service for the Bureau.
4. The new transmission rate is filed as a tariff while the old arrangements with the Bureau were under a long-term fixed-rate contract.
5. The new rate filing was necessitated by a court ruling requiring Otter Tail to wheel for all municipalities in its service area from any power supplier. *U.S. v. Otter Tail* 331 F.Supp. 54 (D.C. Minn. 1971) *aff'd* (and *remanded in part*) 410 U.S. 366 (1973).

We find that the distinctions made by Otter Tail between the service provided under the Bureau-Otter Tail Contract and the proposed rate schedule do not warrant treating Otter Tail's filing as an initial rate schedule. Otter Tail points to the fact that the service rendered under the Bureau-Otter Tail Contract is rendered to the Bureau and not the municipalities. In this instance, the Commission will not allow form to triumph over substance. Though Otter Tail's Contract was technically with the Bureau, the municipalities were third-party beneficiaries of that Agreement. Otter Tail wheels power for the Bureau and is compensated by the Bureau for wheeling service. However, the cost of wheeling is recovered by the Bureau in the rates for power charged to the municipalities. Otter Tail's proposed schedule increases the costs of wheeling which will ultimately be borne by the municipalities.

For the purpose of deciding whether or not to treat Otter Tail's filing as an initial rate or a change in rate schedules, it makes little sense to distinguish excess capacity transmission service from firm transmission service; the basic service being rendered in both instances is transmission service. Nor is the fact that the new transmission rate is filed in tariff form as opposed to a negotiated contract grounds for treating Otter Tail's filing as an initial rate schedule.

Section 205(d) of the Federal Power Act states that no change shall be made by a public utility in *rates*, charges, classification, or *service*, or in any rule, regulation, or contract relating thereto, without thirty days' notice to the Commission and to the public. Section 205(e) confers jurisdiction on the Commission to order a hearing concerning the lawfulness of the proposed rate, charge, classification, or service; and may suspend the proposed new schedule for up to five months.

As discussed above, Otter Tail's filing constitutes a change in rates since it increases the wheelings costs to the municipalities. Assuming arguendo, that Otter Tail is correct in its assertion that it is only rendering service to the Bureau under the Bureau-Otter Tail Contract, its new schedule is still a change in rate schedules. The requirements of Section 205(d) and (e) are applicable to changes in *service* as well as rates. Otter Tail acknowledges that it provided services to the municipalities pursuant to the terms of the Special Agreements. Otter Tail's filing purports to change the nature of the service being rendered. The Special Agreements, among other things, provided for firming transmission service, the instant filing provides for firm transmission service.

Otter Tail states that the Order is inconsistent with the Commission's orders of October 31, 1973, and December 29, 1973, in Docket No. E-8152. That docket concerned the lawfulness of a rate for firm transmission service to the Village of Elbow Lake, Minnesota. Otter Tail states that the only difference between its filed rate in Docket E-8152 and its rates filed

in Docket ER77-5 is the portion of the filing that provides for wholesale service in excess of the power wheeled by Otter Tail for the municipalities; the rate for firm transmission service from any supplier to the municipality is identical in both filings.

The Commission's order of October 31, 1973, in Docket No. E-8152, stated in relevant part:

" . . . Otter Tail's submittal cannot realistically qualify as a change in rate schedule pursuant to Section 35.13 of our Regulations because it effects a change in the nature of service to Elbow Lake by supersedence of all-requirements wholesale service by wheeling of USBR power."

[R. 623]

"The Otter Tail filing amounts to a new rate for a new type of service and should so qualify pursuant to Section 205 of the Federal Power Act and part 35.12 of the Regulations issued thereunder." (at p. 5)

At page 7 of its petition for rehearing Otter Tail states:

Whoever drafted the FPC staff recommendations and the proposed Order for the Commission apparently was ignorant of or deliberately ignored the Commission's rulings in the earlier case, as no mention of the *Elbow Lake* case, Docket No. E-8512, is made at any point in the December 28, 1976, Order.

Otter Tail is correct in its observation that no mention of the Commission's orders in Docket No. E-8152 was made in our Order. However, that omission does not change the result in this case. The Commission properly treated Otter Tail's filing as a change in schedules because it purports to change the nature of the service being rendered. In our Order of October 21, 1974, issued in Docket No. E-8152, we indicated that while the Otter Tail wheeling rate to Elbow Lake constituted an initial rate, that determination does not necessarily apply to Ot-

ter Tail's wheeling rate to some or all of the other communities. 52 FPC 1007. After careful consideration of all relevant factors in this proceeding, we adhere to our earlier interpretation of Otter Tail's filing in Docket No. ER77-5 as a change in rate schedule.¹

SINCE OTTER TAIL'S FILING CONSTITUTED A CHANGE IN RATE SCHEDULES IT WAS SUBJECT TO SUSPENSION PURSUANT TO SECTION 205 OF THE FEDERAL POWER ACT

As discussed in the previous section, Otter Tail's filing was properly treated as a change in rate schedules. In our Order we stated:

Otter Tail's proposed rates rendered for filing in Docket No. ER77-5 have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful. The Commission therefore accepts Otter Tail's proposed transmission rates for filing as a change of rates [R. 624] and suspends them from operation for five months and establishes hearing procedures. (at pages 6-7)

After giving consideration to all relevant factors in Otter Tail's filing, we determined that a five month suspension of the filing was warranted. The appropriate length of a suspension period is a matter committed to agency discretion and is not subject to judicial review. *Municipal Light Boards v. FPC* 450 F.2d 1341 (1971). We have considered the arguments relative to length of suspension period raised in Otter Tail's petition; We again find that a five month suspension of Otter Tail's rate filing in ER77-5 was appropriate. Otter Tail has presented no new facts or principles of law that would justify modification of our suspension determination.

¹ See *Boston Edison Company* Docket Nos. E-9037 and E-8855, issued December 27, 1974, 52 FPC 1973, and *Florida Power & Light Co.*, ER77-175 Order issued April 12, 1977.

DOCKET NO. E-8152 SHOULD BE CONSOLIDATED WITH DOCKET NO. ER77-5

Otter Tail requests that the Commission consolidate Docket No. ER77-5 with Docket No. E-8152. Otter Tail posits that the only difference between its rate file in Docket No. E-8152 and the rate schedule at issue in Docket No. ER77-5 is the portion of the filing that provides for wholesale service in excess of the power wheeled by Otter Tail for the municipalities. It states that the rate for firm transmission of power is identical in both filings.

On May 16, 1975, the Commission issued an Order Directing Suspension of Procedural Date in Docket No. E-8152. We stated in relevant part:

Since Section 313(b) of the Federal Power Act grants the Court of Appeals exclusive jurisdiction to affirm, modify or set aside the Commission orders subject to its review upon the filing of the record therewith, and the filed record and stayed orders comprise every matter subject to Commission scrutiny in the uncompleted Otter Tail hearing and investigation, it is appropriate that the Commission direct the Presiding Administrative Law Judge in Docket No. E-8152 to suspend the June 16th procedural date therein pending issuance of the Court of Appeals' decision, to be accordingly reset by him thereafter.

On April 15, 1977, the United States Court of Appeals, D.C. Circuit, issued its opinion in *The Towns of Alexandria, Minnesota, et al. v. Federal Power Commission* (No. 74-2099) and *The Village of Elbow Lake, Minnesota v. Federal Power Commission* (No. 74-2100). The issues on appeal were whether the Federal Power Commission properly declined to pass on Elbow Lake's claim of rate discrimination prior to completion of a full hearing convened to determine a just and reasonable rate for Otter Tail; and whether [R. 625] the Commission properly expanded the scope of the proceeding to assure that the rate would not discriminate or operate unreasonably

against Otter Tail's other municipal customers. The Court affirmed the Commission's actions on both questions.

On October 21, 1974, in Docket No. E-8152, we issued our Order Expanding Scope of Proceeding which expanded the proceeding to comprehend the rate for transmission service by Otter Tail to all 18 towns including Elbow Lake. This action was taken because Otter Tail had made it clear that the Elbow Lake rate finally approved by the Commission would be the rate assessed against the other municipal customers for transmission service. At page 3 of our October 21st Order we state:

Of course we recognize that Otter Tail has not yet filed rate changes in connection with the wheeling service it provides to the 17 towns. At such time as it does so, particular questions in connection with particular communities and their contracts may arise. We cannot now anticipate all of those questions, and accordingly we recognize that we may not be able, in this proceeding, to dispose finally of all aspects of the foreseen rate changes as they apply to each of these communities. But Otter Tail has announced that the rate to Elbow Lake that is established as a result of this proceeding will, at some future time, become "the only rate then available to a municipality for transmission service." That being so, it is our purpose now to cause that rate issue as it affects all 18 towns to be heard and decided in the instant docket. While, as we have stated, this may not result in a final resolution of all questions as to all 18 towns, we intend herein to resolve the rate question as fully as we possibly can.

Otter Tail's new rate filing in Docket No. ER77-5 obviates the need for the continued utilization of the expanded proceeding in Docket No. E-8152. The proceeding in Docket No. ER77-5 is the appropriate forum for the determination of all issues pertaining to Otter Tail's new transmission filing for the municipalities. We will therefore rescind the expan-

sion order in Docket No. E-8152. The proceeding in that docket will be confined to the consideration of the lawfulness of the transmission rate to Elbow Lake.

[R. 626]

However, because of common issues of law and fact, Docket No. E-8152 should be consolidated with Docket No. ER77-5. Such action will avoid needless duplication and promote administrative efficiency. The only difference between Otter Tail's rate in Docket No. E-8152 and the rate in Docket No. ER77-5 is the portion of the filing that provides for wholesale service in excess of the power wheeled by Otter Tail for municipalities.

THE NOTICES OF TERMINATION OF THE BUREAU-OTTER TAIL CONTRACT AND THE SPECIAL AGREEMENTS WERE PROPERLY SUSPENDED

In our Order, we suspended the effectiveness of the notice of termination of the Bureau-Otter Tail Contract (Docket No. ER77-6) and the notices of termination of the Special Agreements (Docket No. ER77-7) for five months,² and ordered an expedited hearing to determine if such actions were consistent with the public interest. Otter Tail has not posited any new facts or principles of law that would warrant any change in our suspension of the above-referenced notices of termination.

DOCKET NO. E-9544 SHOULD BE TERMINATED

On November 28, 1975, the Cities of Alexandria, Barnesville, Benson, Detroit Lakes, Henning, Tyler, and Warren, Minnesota filed a complaint against Otter Tail alleging that Otter Tail had failed to comply with Section 35.15 of the Commission's Regulations. This proceeding was designated as Docket No. E-9544. The municipalities' Special Agreements expired by their own terms as follows:

² For those municipalities who were not parties in Docket No. E-9544.

City	FPC Rate Schedule No.	Expiration Date of Agreement
Alexandria, Minnesota	125	10/28/73
Barnesville, Minnesota	135	11/30/75
Benson, Minnesota	133	11/30/75
Detroit Lakes, Minnesota	139	11/30/75
Henning, Minnesota	134	11/30/75
Tyler, Minnesota	116	3/22/72
Warren, Minnesota	140	11/30/75

The Cities state that Alexandria and Tyler requested Otter Tail to continue to furnish service under the Special Agreements beyond the expiration date of their contracts. They assert that Alexandria and Tyler terminated the service by letters dated February 12, 1975 and February 18, 1975, and ceased receiving and paying for services after the date of their respective termination letters. Additionally, the Cities maintain that [R. 627] Barnesville, Benson, Detroit Lakes, Henning, and Warren confirmed the expiration of their Special Agreements with Otter Tail and notified it that they no longer desired to receive firming transmission service after the expiration of the Special Agreements. The Cities allege that Alexandria and Tyler did not receive a response from Otter Tail to their letters of termination and that Barnesville, Benson, Detroit Lakes, Henning and Warren received responses from Otter Tail indicating that Otter Tail intended to continue to provide service under the Special Agreements after the expiration of the Agreements and the Cities' refusal to accept such services.

In our Order, we consolidated Docket No. E-9544 with Docket No. ER77-5.

Otter Tail states that Docket No. E-9544 should not have been consolidated for any purpose with Docket No. ER77-5. It argues that it should be terminated in accordance with the

December 31, 1976 termination dates as reflected by the notices of termination filed in Docket No. ER77-7. We agree with Otter Tail that the proceeding in Docket No. E-9544 should be terminated. However, we disagree with the contention that the Special Agreements should be deemed to have terminated on December 31, 1976.

At page 26 of its petition for rehearing, Otter Tail states:

The Company's basic position on the issues in Docket E-9544 is that the 7 Minnesota municipalities who initiated that proceeding cannot have the one mill excess capacity wheeling rate provided for in the Bureau contract without also paying for the Transmission Firming Service at 1.5 mills/kWh (subject to discount for customers with generation) that was part of what all parties agreed to when excess capacity wheeling service was initiated. To compel wheeling under the Bureau contract for one mill/kWh without allowing Otter Tail to collect the additional 1.5 mills/kWh for Transmission Firming Service is to compel wheeling service at even less than the non-compensatory level of the old arrangements.

In making the above argument it is apparent that Otter Tail is continuing to rely on its discredited package deal theory which has been rejected on more than one occasion by this Commission,³ [R. 628] and by the Court of Appeals for the Eighth Circuit (*Otter Tail v. FPC* 536 F.2d 240 (1976)), The Bureau-Otter Tail Contract, standing by itself, obligated Otter Tail to provide transmission service to the Bureau for the benefit of the municipalities through December 31, 1976, at one mill/kWh.

The Special Agreements provided for a number of other ser-

³ *Otter Tail Power Company*, Docket No. E-9420, Order Rejecting Filing, issued March 31, 1975; *Otter Tail Power Company*, Docket No. E-9507, Order Rejecting Filing, Setting Matter For Hearing And Granting Interventions, issued August 29, 1975.

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vices to be rendered to the municipalities, including firming transmission service. There is no indication whatsoever that the parties contemplated that the termination of the Special Agreements would be coterminous with the Bureau-Otter Tail Contract. In fact, objective manifestations of intent suggest otherwise. While the Bureau-Otter Tail Contract was to terminate on its own terms on December 31, 1976, the Special Agreements contain expiration dates ranging from March 22, 1972, to December 21, 1980.

Otter Tail has presented no new facts or principles of law which justify modification of our acknowledgement of the terminations of the Special Agreements as reflected in ordering paragraphs I and J of our Order.

The Commission finds:

(1) Good cause exists to grant in part and deny in part Otter Tail's application for rehearing.

(2) Otter Tail's supplement to its petition for rehearing and its response to our order granting rehearing in this proceeding should be rejected.

(3) The proceeding in Docket No. E-9544 should be terminated in accordance with the termination dates established in ordering paragraphs I and J of our order of December 28, 1976 in these dockets.

(4) The proceeding in Docket No. E-8152 should be confined to the consideration of the lawfulness of the transmission rate to Elbow Lake.

(5) Docket No. E-8152 should be consolidated with Docket No. ER77-5 for the purposes of a hearing and decision thereon.

The Commission orders:

(A) The proceeding in Docket No. E-9544 is hereby terminated in accordance with the termination dates established in ordering paragraphs I and J of our December 28, 1976 order in these dockets.

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[R. 629]

(B) The proceeding in Docket No. E-8152 shall be confined to the consideration of the lawfulness of the transmission rate to Elbow Lake.

(C) Docket No. E-8152 is hereby consolidated with Docket No. ER77-5 for the purposes of a hearing and decision thereon.

(D) Otter Tail's supplement to its petition for rehearing and its response to our order granting rehearing in this proceeding are hereby rejected.

(E) Otter Tail's petition for rehearing in all other respects is hereby denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

CERTIFICATE OF SERVICE

I, David F. Lundeen, attorney for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify all parties required to be served have been served. Such service was made on the 15th day of December, 1978, by mailing copies of the Separate Appendix to the respondents named below by depositing the same in the United States Post Office, with postage prepaid, addressed to the following:

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